

FILED

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JOSEPH F. SPANIEL, JR.
CLERK

No. 88-32

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

JOINT APPENDIX

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Counsel for
Respondent

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Petition for Certiorari filed
July 5, 1988
Certiorari granted October 3, 1988

239W

TABLE OF CONTENTS

	<u>Page</u>
Relevant Docket Entries.....	1
Criminal Complaint (Winslow).....	3
Criminal Complaint (Tuttle).....	5
Motion to Dismiss.....	7
Report of a Question of Law.....	14
Stipulation of Facts.....	16
Opinion and Order of the Supreme Judicial Court.....	Appendix A to the Petition for a Writ of Certiorari

RELEVANT DOCKET ENTRIES

Date Proceedings

1986

May 29 Criminal Complaint
Docket No. 216230 (Winslow)

May 29 Criminal Complaint
Docket No. 216231 (Tuttle)

June 12 Morash pleads not guilty

Nov. 4 Motion to Dismiss filed

Nov. 10 Hearing on the Motion to
Dismiss

1987

Jan. 7 Report of a Question of Law to
the Appeals Court Pursuant to
Massachusetts Rule of Criminal
Procedure 34 and Stipulation
of Facts filed

Jan. 14 Interlocutory report forwarded
to Appeals Court

Jan. 15 Docketed in Appeals Court,
A.C. No. 87-40

March 23 Morash's Brief filed

April 16 Order of Supreme Judicial
Court transferring case from
Appeals Court

April 24 Docketed in Supreme Judicial
Court, S.J.C. No. 4463

1987

July 27 Commonwealth's Brief filed

Sept. 21 Morash's Reply Brief filed

1988

May 5 Supreme Judicial Court
Decision

May 5 Supreme Judicial Court
Rescript

CRIMINAL COMPLAINT Docket Number 216230

Trial Court of Massachusetts
Boston Municipal Court Department

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE BOSTON MUNICIPAL COURT DEPARTMENT

The within named and undersigned
complainant, on behalf of the
Commonwealth, on oath complains that on
the date and at the location stated
herein the defendant did commit the
offense(s) listed below in the City of
Boston and within the judicial district
of Boston Municipal Court.

Boston Municipal Court

CC# none

Name, Address & Zip Code of Defendant

Richard N. Morash, Pres.
Home Savings Bank
69 Tremont St.
Boston, MA

Def.Dob Offense Code(s)
411a

Date of Offense Place of Offense
5/24/85 100 Cambridge St.

Complainant
Christopher C. Winslow/Hood
Dept. of Labor & Indus.

Date of Complaint Return Date and Time
5/29/86 6/12/86 9 AM

Count-Offense

A. VIOLATION WEEKLY WAGE LAWS C149 S148

did employ Christopher C. Winslow, as Vice President, and the said Christopher Winslow being discharged from said employment, did not then and there receive pay in full, on the day of his discharge, the wages earned by and due him/her amounting to \$14,520.00.

Count-Offense

B.

Count-Offense

C.

Count-Offense

D.

Complainant or Authorized Officer

Sworn to before

Clerk-Magistrate/Asst.Clerk

On (Date) 5/29/86

CRIMINAL COMPLAINT Docket Number 216231

Trial Court of Massachusetts
Boston Municipal Court Department

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE BOSTON MUNICIPAL COURT DEPARTMENT

The within named and undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below in the City of Boston and within the judicial district of Boston Municipal Court.

Boston Municipal Court

CC# none

Name, Address & Zip Code of Defendant

Richard N. Morash, Pres.
Home Savings Bank
69 Tremont St.
Boston, MA

Def.Dob Offense Code(s)
 411

Date of Offense Place of Offense
4/19/85 100 Cambridge St.

Complainant
William Tuttle/Hood
Dept. of Labor & Indus.

Date of Complaint Return Date and Time
5/29/86 6/12/86 9 AM

Count-Offense

A. VIOLATION WEEKLY WAGE LAWS C149 S148

did employ William Tuttle, as Senior Vice President, and the said William Tuttle being discharged from said employment, did not then and there receive pay in full, on the day of his discharge, the wages earned by and due him/her amounting to 12,473.33.

Count-Offense

B.

Count-Offense

C.

Count-Offense

D.

Complainant or Authorized Officer

Sworn to before
Clerk-Magistrate/Asst.Clerk

On (Date) 5/29/86

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT OF THE
COMMONWEALTH
DISTRICT COURT DEPT.
BOSTON MUNICIPAL COURT

Docket Nos.

21-62-30

21-62-31

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

RICHARD N. MORASH,
HOME SAVINGS BANK,
Defendants.

MOTION TO DISMISS

Pursuant to Mass. R. Crim. P. 13(c),
defendants Yankee Bank for Finance and
Savings, F.S.B. (formerly known as Home
Savings Bank, F.S.B.) and its president,
Richard N. Morash, (together "Yankee
Bank") hereby move that this Court
dismiss the above-captioned actions for
lack of subject matter jurisdiction or,

in the alternative, for failure to charge an offense. As grounds therefor Yankee Bank states as follows:

- (1) The Massachusetts Department of Labor and Industries (the "DLI") has brought this action under the Massachusetts Payment of Wages Statute, G.L. c.149, §148 ("Chapter 149"). The DLI charges that Yankee Bank has unlawfully failed to pay two terminated vice presidents, Mr. Christopher C. Winslow and Mr. William R. Tuttle (the "claimants"), for unused vacation time. Mr. Winslow claims he is entitled to a total payment of \$14,520 for 66 unused vacation days. Mr. Tuttle claims he is entitled to a total

payment of \$11,146.38 for 42 unused vacation days.^{1/}

- (2) Chapter 149 provides that vacation pay constitutes wages if it is due to employees pursuant to a written or oral agreement. The DLI has taken the position that Yankee Bank made such an agreement if it had a formal policy or practice of making such payments.

- (3) Yankee Bank submits that if, arguendo, the bank had such a policy or agreement, then the Employee Retirement Income Security Act of 1974, 29 U.S.C.

^{1/} The DLI also charges that Yankee Bank has failed to pay Mr. Tuttle for five (5) days actually worked. Yankee Bank, however, tendered payment of \$971.02 to Mr. Tuttle on April 17, 1985. Mr. Tuttle refused to accept the check because it did not include vacation pay. Those charges are not covered by this Motion.

§1001 et seq. ("ERISA") preempts these actions under Chapter 149. As grounds therefor, Yankee Bank states:

(a) Section 1144(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any benefit plan . . ." (emphasis added)

(b) These cases involve state law because they are brought under M.G.L. c.149.

(c) M.G.L. c.149 relates to a benefit plan because (1) according to §1002(1) of ERISA, an employee welfare benefit plan is:

any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is

maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . vacation benefits . . . (emphasis added)

and (2) in Barry v. Dymo Graphic Systems, Inc., the Supreme Judicial Court ruled that an employer's contractual agreement to pay employees for accrued but unused vacation time is a plan or program to provide vacation benefits covered by ERISA.

(4) This Court is obligated to follow the controlling precedent of Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830 (1985) in which the Supreme Judicial Court held (a) that an employer's agreement by

handbooks, manuals and memoranda to pay employees for unused vacation pay, is a vacation benefits plan under ERISA and (b) that ERISA preempts actions under state law to collect benefits under such a plan.

- (5) In the alternative, Yankee Bank submits that if the DLI takes the position that the bank did not have a vacation pay plan or program covered by ERISA, then the DLI cannot prove a violation of Chapter 149. If, rather than having a plan or formal policy, the bank gave employees payment in lieu of vacation only on an ad hoc, discretionary basis, then there was no agreement to make such payments and failure to pay Messrs. Winslow and Tuttle for unused vacation time

is not a violation of Chapter 149.

WHEREFORE, Yankee Bank respectfully requests that this Court dismiss Mr. Winslow's case in its entirety and Mr. Tuttle's case with respect to vacation pay.

YANKEE BANK FOR FINANCE AND SAVINGS, F.S.B. and
RICHARD N. MORASH,
By their attorneys,

Jason Berger, P.C.
Marcia E. Greenberg
Peabody & Brown
One Boston Place
Boston, MA 02108
617-723-8700

Date: November 3, 1986

Certificate of Service

I, Marcia E. Greenberg, attorney for the Defendants, hereby certify that I have had a copy of the attached Motion to Dismiss delivered by hand to Keith A. Hood, Senior Counsel, Department of Labor and Industries, 100 Cambridge Street, Boston, MA 02202, attorney for the plaintiff.

Signed under the pains and penalties of perjury this 3d day of November, 1986.

Marcia E. Greenberg

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT OF THE
COMMONWEALTH
DISTRICT COURT DEPT.
BOSTON MUNICIPAL COURT

Docket Nos.
866-817, 818

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

RICHARD N. MORASH,
Defendant.

REPORT OF A QUESTION OF LAW TO
THE APPEALS COURT PURSUANT TO
MASSACHUSETTS RULE OF
CRIMINAL PROCEDURE 34

The Commonwealth of Massachusetts contends that the defendant in these cases violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants, two former employees, for vacation time that they accrued but did not use. The defendant has filed a motion to dismiss, alleging that the Commonwealth cannot prosecute these cases

because Section 148 is preempted by federal law. This motion raises an important question of law that, in my judgment, requires a decision from this Court. Therefore, I report the following question of law pursuant to Mass. R. Crim. P. 34:

Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA") preclude prosecution of an employer who has allegedly violated G.L. c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement?

Attached is a Stipulation of Facts prepared by the parties in this case.

John A. Pino
Associate Justice of the
Boston Municipal Court

Date: January 7, 1987

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT OF THE
COMMONWEALTH
DISTRICT COURT DEPT.
BOSTON MUNICIPAL COURT

Docket Nos.
866-817
866-818

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

RICHARD N. MORASH,
Defendant.

STIPULATION OF FACTS

For the purpose of reporting the following question of law to the Massachusetts Appeals Court, pursuant to Rule 34 of the Massachusetts Rules of Criminal Procedure and the November 24, 1986 Order of this Court, the parties hereby submit this Stipulation of Facts.

Question Reported

Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA"), preclude prosecution of an employer who has allegedly violated G.L. c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement?

Stipulation of Facts

The defendant in these cases, Richard N. Morash ("Mr. Morash"), is the president of The Yankee Bank for Finance and Savings, F.S.B., formerly known as Home Savings Bank, F.S.B. (the "Bank"). In May, 1984 The Yankee Companies, Inc. acquired the stock of Home Savings Bank, F.S.B. Home Savings Bank had been in serious financial trouble and was threatened with a regulatory merger.

On May 29, 1986 Messrs. Christopher C. Winslow and William R. Tuttle (the "complainants"), each a former vice-president of the Bank, applied for and were granted criminal complaints in the Boston Municipal Court. Mr. Winslow alleged that the Bank discharged him on May 24, 1985, and that it owes him \$14,520 for 66 unused vacation days. Mr. Tuttle alleged that the Bank discharged him on April 19, 1985, and that it owes him \$11,146.38 for 42 unused vacation days. The Commonwealth contends that the Bank violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants for vacation time they accrued but did not use.

The Commonwealth, through the Department of Labor and Industries (the "DLI"), is prosecuting these criminal complaints. The DLI and Mr. Morash agree that the following elements of the DLI's

prima facie case are undisputed: (1) that the complainants were employed by the Bank, (2) that the Bank terminated the complainants' employment relationships with the Bank and (3) that the Bank did not offer to pay the complainants the amount of vacation time that they claim they are owed (although it did offer to pay them for vacation time that they accrued after January 1, 1985).

The Question in these cases arises from Section 148's provision that where there is an oral or written agreement to compensate employees for vacation time, vacation pay constitutes wages. For the purposes of this Question only, it is agreed that the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time. Also for the purposes of this Question only, it is agreed that such agreements stem from

handbooks, manuals, memoranda and practices. It is further agreed that when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets.

On November 3, 1986 Mr. Morash moved to dismiss both complaints on the grounds that, in order for the DLI to prove a violation of Section 148, it must prove the existence of an oral or written agreement or policy to compensate employees for all unused vacation time. The Defendant's contention is that proof of such an agreement or policy would constitute proof of a welfare benefit plan, which would fall within ERISA's exclusive jurisdiction.

Respectfully submitted,

RICHARD N. MORASH,
By his attorneys,

Jason Berger, P.C.
Marcia E. Greenberg
Peabody & Brown
One Boston Place
Boston, MA 02108
617-723-8700

COMMONWEALTH OF MASSACHUSETTS,
By its attorneys,

Keith A. Hood, Senior Counsel
Edward F. Connelly, Senior
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Department of Labor and
Industries
100 Cambridge Street
Boston, MA 02202
617-727-3457

Dated: January 7, 1987